IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1193

UNITED STATES OF AMERICA, *Appellant*

v.

TRAVIS PAUL ENMONS, JACKIE J. BENDO, ED WAYNE BARTON, AND MILTON RAY WOODWARD, *Appellees*

On Appeal from the United States District Court for the Eastern District of Louisiana

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MOTION OF APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Appellees move the Court for leave to file a supplemental brief limited to the Government's contention, asserted for the first time in its reply brief, that a threat to compel payment of a just debt is extortion although the end sought does not constitute felonious misappropriation of property (Gov't. reply br. p. 10).

Although our brief was filed on September 20, 1972, the Government did not serve its reply brief until the evening of November 29, 1972, so that we had no prior adequate opportunity to respond to this particular contention. Accordingly, in order to complete our presentation in response to the Government's position, we respectfully request leave to file the supplemental brief, attached hereto, confined to this matter.

BERNARD DUNAU
912 Dupont Circle Building, N. W.
Washington, D. C. 20036
Attorney for Appellees.

Of Counsel:

LOUIS SHERMAN
THOMAS X. DUNN
ELIHU I. LEIFER
Sherman, Dunn, Cohen & Leifer
1125 Fifteenth Street, N.W.
Washington, D. C. 20005

ALEX W. WALL
Dodd, Hirsch, Barker, Avant & Wall
429 Government Street
Baton Rouge, Louisiana

SAM J. D'AMICO
D'Amico, Curet and Bush
610 Reymond Building
Baton Rouge, Louisiana

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SUPPLEMENTAL BRIEF FOR APPELLEES

To support its general position that, without regard to felonious misappropriation of property as the end sought, the exertion of wrongful means alone establishes extortion, the Government asserts that a threat to compel payment of a just debt is extortion despite the absence of larcenous intent (Gov't. reply br. p. 10). We shall show that, at the time that the Hobbs Act was enacted, this was not the New York view, that it represents a disputed line of authority, and that it is at best

a by-road without relevance in ascertaining the meaning of Congress when it prohibited obstruction of commerce "by robbery or extortion."

1. *New York law*: It is common ground that New York law was Congress' point of reference when it prohibited "robbery or extortion" obstructing commerce. At the time that the Hobbs Act was passed, the sole "debt" case in New York of which we know was *People* v. *Griffin,* 2 Barb. (N.Y.) 427 (1848), and that case squarely supports our analysis. There, the accused was charged "with having written letters to Stephen Heath, threatening to burn and destroy his property unless he would send the defendant, within a certain time, the sum of $16, claimed by the defendant to be due from Heath" (*id.* at 427). An instruction was refused that it is not extortion "to obtain, by threats, money that is justly due to the one who makes the threats" (*id.* at 428). An ensuing conviction was reversed for failure to give the requested instruction. The court explained that (*id.* at 429-430):

> The intent must be to *extort* or *gain.* Can it be truly said that a person extorts money which is justly his due? The word *gain,* in the connection here used, I regard as synonymous with *extort*: at least I think it must mean something more than merely to obtain, or get possession of. If that was all the legislature intended by it, it seems to me they would have employed different language. In view of the well established rule, that penal statutes are to receive a strict construction, I must interpret this as intending to embrace only cases where the intent is to obtain that which in justice and equity the party is not entitled to receive. The end, as well as the means employed to obtain it, must be wrongful and unlawful. [Emphasis in original.]

Larcenous intent coupled with wrongful means was thus held to be requisite. In 1952, *subsequent* to enactment of the Hobbs Act, in a case not cited by the Government, a different view was expressed on appeal by one New York court, *People* v. *Fichtner,* 281 App. Div. 159, 118 N.Y.S. 2d 392 (1952), but the view of the *Fichtner* court did not survive New York's comprehensive restatement of its penal law in 1965. In 1965, New York explicitly embraced extortion within the crime of larceny. 39 McKinney's Cons.L. of N.Y. Anno., Penal Law, Art. 155. It defined "larceny" as follows (§ 155.05-1):

> A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

It made the intent specified in the quoted § 155.05-1 indispensable to a conviction of larceny (§ 155.05-2):

> Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

And among "the following ways" in which larceny could be committed, if the prescribed intent was found, was "By extortion" (§ 155.05-2(e)). Accordingly, extortion requires, as stated in § 155.05-2, "a *wrongful* taking, obtaining or withholding of another's property, with the intent", as stated in § 155.05(1), "to deprive another of property or to appropriate the same to himself or to a third person . . . ."

The comment on this restatement is that "extortion in its true sense is nothing more than a wrongful acquisi-

tion of property (by intimidation) *with larcenous intent* (cf. former Penal Law § 850)." 39 McKinney's Cons. L. of N.Y. Anno., Penal Law, § 155.05, p. 419. (Emphasis supplied.) Accordingly, precisely as we have argued, felonious misappropriation of property is an essential element of extortion.

To make certainty doubly sure, New York in 1965 also expressly adopted the following defenses (§ 155.15):

> 1. In any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith.
>
> 2. In any prosecution for larceny by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

The comment on subdivision 1 is that the "provision is perhaps unnecessary, for it would seem that a defendant who establishes that his taking was 'under a claim of right made in good faith' automatically negates larcenous intent . . ." 39 McKinney's Cons.L. of N.Y. Anno., Penal Law, § 155.15, p. 446. "Subdivision 2", the comment states, "is borrowed from a comparable provision of the American Law Institute's Model Penal Code (§ 223.4). Its principal purpose is to exclude from criminal liability the victim of a larceny or other crime causing financial loss, who threatens the thief or culprit with criminal prosecution based upon the conduct involved unless he makes good the loss"

(*ibid.*). The cited section of the Model Penal Code provides that:

> It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

The upshot is that in the so-called "debt" area, which the Government would uncritically transpose to the wholly different context in which the Hobbs Act operates, the Government's version of extortion was not when the Hobbs Act was passed, and is not now, the law of New York.

2. *Disputed line of authority*: The Government represents its view of extortion in the "debt" cases as if it were uniformally accepted. The fact is, however, that the Government relies on a disputed line of authority. The view espoused by the Government is not shared by Massachusetts (*Commonwealth* v. *Jones,* 121 Mass. 57 (1876)), Indiana (*State* v. *Hammond,* 80 Ind. 80 (1881)), Mississippi (*State* v. *Ricks,* 108 Miss. 7, 66 So. 281 (1914)), Ohio (*State* v. *Barger,* 111 Ohio St. 448, 145 N.E. 857 (1924)), or Washington (*State* v. *Burns,* 161 Wash. 362, 297 P. 212 (1931)). Furthermore, as robbery and extortion are interlocked felonies, it is significant that one who collects a debt or supposed debt at gunpoint, while guilty of an assault, is not generally held guilty of robbery, at least if the debt is liquidated and the creditor takes no more than is owed him, for there is no larcenous intent. *Richardson* v. *United States,* 403 F.2d 574 (C.A.D.C., 1968); *Butts* v. *Com-*

monwealth, 145 Va. 800, 133 S.E. 764 (1926); *People* v. *Gallegos,* 130 Colo. 232, 274 P. 2d 608 (1954); *People* v. *Butler,* 65 Cal.2d 569, 421 P.2d 703 (1967).

3. *The Government's cases:* The cases on which the Government relies stand for a good deal less on analysis than the Government would have it. In *People* v. *Beggs,* 178 Cal. 79, 172 P. 152 (1918), the accused sought to defend the extraction of $2,000 on the ground that the victim owed him $50. As to *State* v. *Richards,* 97 Wash. 587, 167 P. 47 (1917), in 1931 the Washington Supreme Court repudiated an overbroad reading of its prior opinion, and of prior like opinions in other states, holding that there is no extortion if the threat is limited to the amount due. *State* v. *Burns,* 161 Wash. 362, 297 P. 212 (1931). In *State* v. *Phillips,* 62 Id. 656, 115 P.2d 418 (1941), the court approved a jury institution that "you have a right to take into consideration whether or not the defendants, or either of them, honestly believed that the defendant Phillips was entitled to a refund from the said Gertje" (115 P.2d at 421). And in *Ine re Sherin,* 27 S.D. 232, 130 N.W. 761 (1911), the question arose in a disbarment proceeding, not in a criminal prosecution for extortion.

4. *The upshot:* The Government detours on a byroad of a disputed line of "debt" cases despite the absence of a whisper in the legislative history of the Hobbs Act that its proponents even knew of them. It disregards the main stem of robbery and extortion as compound crimes combining felonious misappropriation of property and wrongful means. It would have us overlook that, in the immediately relevant area of labor action, it is the felonious misappropriation of property that divides the licit from the illicit in determining whether conduct is extortionate (our brief pp.

37-40). It remains indifferent to its inability to cite a single case from any jurisdiction in which strike violence to obtain better employment terms was held or even suggested to be extortionate. It was better advised when it informed the Court on brief in the *Local 807* case that (p. 46):

> If the defendants had been seeking to achieve a legitimate labor objective, we doubt whether their activities would come within the scope of the Act simply because of the presence of violence. The whole tenor of the Act indicates that Congress intended to punish activities similar to extortion; violence used as a means of obtaining a lawful labor union objective is not extortion but simply a breach of the peace or other kindred unlawful act.

Respectfully submitted,

BERNARD DUNAU
912 Dupont Circle Building, N. W.
Washington, D. C. 20036
Attorney for Appellees.

Of Counsel:

LOUIS SHERMAN
THOMAS X. DUNN
ELIHU I. LEIFER
Sherman, Dunn, Cohen & Leifer
1125 Fifteenth Street, N.W.
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